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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1974

No. 73-1596

ROBERT E. HAMPTON, Chairman of the United States Civil Service Commission, et al., *Petitioners*,

vs.

MOW SUN WONG, et al., *Respondents*.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF SANDIGAN AND CHINESE FOR AFFIRMATIVE ACTION AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI[1]

Sandigan is a California non-profit corporation established to provide services and assistance to Pilipino* immigrants arriving and settling in San

[1]The letters of Petitioners and Respondents, consenting to the filing of this brief *amici curiae*, pursuant to Rule 42(2) of the Rules of this Court, have been filed with the Clerk of the Court.

*Sandigan requests that this brief reflect the preference of individuals who come from the Philippine Islands to be known as Pilipinos, not Filipinos.

Francisco. While Sandigan is a multi-service center, its principal emphasis is upon identifying and securing employment for Pilipino newcomers. Many of these new permanent residents are highly skilled and well educated but need help to overcome language barriers; others are not so well skilled and require placement in governmental training programs in order to compete in the current job market. In any case, Sandigan deals daily, on behalf of its clients, with prospective employers and government agencies to develop good employment or, at least, employment opportunities for Pilipinos.

Chinese for Affirmative Action [CAA] is an organization dedicated to defending the civil rights of the Chinese community in the United States. Based in San Francisco, CAA is actively engaged in securing health, education, welfare, manpower training, and economic services to meet the needs of Chinese communities. It has negotiated jobs for Chinese in both private and public employment sectors and has initiated many English and Chinese-language cultural programs on radio and television. CAA has also designed and promoted affirmative action plans for various businesses, unions, and government agencies for the employment of Chinese individuals.

ARGUMENT

INTRODUCTION

In America, the jobs people hold affect virtually every aspect of their lives. In a very real way, we are what we do. Employment dictates status. It affects self-esteem. Income from employment determines the quality of life, affecting many of its components, such as housing, medical care, nutrition and education.

Barriers to employment not only affect the life of the worker and his family but also make a significant impact on his community, particularly when large segments of the community are consigned to low-level, dead-end jobs in the private sector as a result of those barriers. The exclusion of resident aliens from almost 3,000,000 jobs in the federal civil service is such an obstacle.

San Francisco experiences this problem acutely. The city is a focus of immigration; resident aliens represent more than 10% of the city's population.[2] During the past ten years alone, 81,637 newly arrived aliens have established their residence in San Francisco.[3]

The denial of the opportunity to compete for merit system jobs is especially debilitating to the Asian community.[4] Nationwide, the number of immigrants from China, Taiwan and Hong Kong has increased from

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[2]73,031 aliens in a total population of 715,673. United States Bureau of the Census, Census of Population: 1970. DETAILED CHARACTERISTICS: Final Report PC(1)-D6, California Section 1, Table 144, p. 6-1205.

[3]United States Department of Justice, Immigration and Naturalization Service, "Report of the Commissioner of Immigration and Naturalization, 1972," (hereinafter "INS Report"), Table 34, p. 96.

[4]For conciseness and because San Francisco is a major residence for Asian immigrants, this brief focuses on Asians, particularly Chinese and Pilipino groups in San Francisco, to exemplify the difficulties faced by all resident aliens.

4,769 in 1965 to 21,730 in 1972.[5] Pilipino immigration to the United States has expanded from 3,130 in 1965 to 29,376 in 1972.[6] Immigrants to San Francisco from the Philippines have increased from 397 in 1963 to 2,846 in 1972, and immigration from China, Taiwan and Hong Kong to San Francisco has increased from 750 in 1963 to 1,434 in 1972.[7]

These newcomers, needing employment so that they can make a reality of their dream to establish new homes and new lives in our country, are confronted by drastically conflicting federal policies. With one hand they are welcomed as skilled immigrants and with the other hand they are rejected from employment in a significant sector of the economy.[8] The inconsistency of these federal policies is demeaning to the individual alien, devastating to his economic well-being, and debilitating to his community. The waste of human resources and the cost of government services to resident alien poor alone are persuasive evidence for affirmation of the decision of the Ninth Circuit.

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[5]INS Report, *supra*, Table 54.

[6]*Ibid.*

[7]*Id.* at Tables 12A, 12B and 13.

[8]The named plaintiffs, now respondents, in this action exemplify the consequences of the federal exclusionary policies at issue: Mow Sun Wong, with 10 years' experience as an electrical engineer, applied for a janitorial position (A.24, 25, 29). With almost 20 years as a businessman, Sui Hung Mok was trying to get work as a file clerk (A.25, 26). Francene Lum applied for an educational program evaluator position on the basis of 15 years' teaching experience (A.27). Kae Chong Lui worked satisfactorily for the U.S. Post Office on the mail loading platform (A.28). Yet each was deprived of the opportunity to perform work for which he was amply qualified, if not over-qualified.

IMMIGRATION AND THE AMERICAN LABOR FORCE: HISTORICAL CONTEXT

Immigration has been a continuing source of strength and needed manpower for the American economy. Immigration from non-European nations, particularly in the Eastern Hemisphere, began with the Industrial Revolution's need for laborers and there were few restraints placed on immigration from 1848 to 1882. Laborers from China, for example, were the primary workmen on the great transcontinental railways and a major work resource for development of the gold mines of California during this period.[9]

After the railroads had been built, and the economic boom from the gold rush had begun to fade, the demand for cheap labor subsided. Asians were compelled to compete for the relatively fewer available jobs. Massacres, anti-Asian riots, special "anti-Coolie clubs" and labor organization-sponsored boycotts of Chinese merchants resulted.[10] Municipal and statewide anti-Chinese laws abounded in California.[11] Even

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[9]Asians were actively recruited as long as a pressing need for cheap, hard-working laborers existed:

> "Chinese were often willing to perform labor which was uncongenial to the Caucasian; uncongenial because it involved domestic tasks, high risk, and long periods of strenuous work. As a result, Chinese laborers were widely sought and, in many instances, recruited directly from China."

Bay Area Social Planning Council, Working Paper VII, San Francisco, 1970, (hereinafter "BASPC Study") p. 53.

[10]*See, e.g., Yick Wo. v. Hopkins*, 118 U.S. 356 (1886).

[11]Perhaps the most infamous law passed in California was Article XIX of the State Constitution, added in the Convention of 1879. This amendment forbade the employment of Chinese in any corporation formed in the state, on any state, municipal and county public works, and provided for legislation whereby any city or town

the federal government reacted to the situation: the Chinese Restriction Act of 1882, as amended in 1884, was the first federal, racially exclusionary immigration law.[12] That Act suspended the immigration of Chinese laborers for ten years and denied naturalization to all Chinese. Subsequent enactments generally banned immigration by Asian persons until the repeal of the exclusion laws in 1943.[13] Thereafter, the quota system continued to keep Chinese immigration to a minimum.[14]

Immigration was not co-extensive with eligibility for citizenship. Although Chinese persons had been immigrating to the United States for nearly a century, they were barred from applying for U.S. citizenship until 1943.[15]

Pilipinos faced a more subtle, but no less discriminatory scheme. The Philippine Islands Independence Act was passed on March 24, 1934.[16] Shortly thereafter, the so-called Repatriation Act of 1935 attempted to encourage departure of Pilipinos by providing free transportation back to the Philippine Islands. Up until 1946 Pilipinos were not permitted to apply for U.S. citizenship.[17]

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might expel its Chinese inhabitants. Much of this amendment was rendered inoperative by judicial decisions. *See, In re Viburca Parrott*, 6 Sawyer 349 (1879); *In re Ah Chong*, 6 Sawyer 451 (1890); *In re Lee Sing*, 43 F. 359 (1890).

[12]22 Stat. 186, ch. 374, 46 U.S.C. §§151-162.

[13]57 Stat. 600, 8 U.S.C. §703.

[14]For an excellent summary, see BASPC Study, *supra*, at 55-59.

[15]57 Stat. 600, 601, 8 U.S.C. §703.

[16]48 Stat. 456, ch. 84.

[17]60 Stat. 416, 8 U.S.C. §703.

Shortly thereafter, in 1952, the Immigration and Nationality Act (commonly known as the McCarran-Walter Act) was enacted to modify the existing quota systems, leaving the Pilipinos with an annual limitation of 105 immigrant visas.[18]

This racially restrictive immigration policy was finally abandoned with the enactment of legislation on October 3, 1965. [19] The new law abolished the strict national origins quota system, substituting an allocation system emphasizing family reunification and preferred occupational skills. An annual numerical ceiling of 170,000 immigrant visas for persons from the Eastern Hemisphere was established, with a maximum of 20,000 visas available to any one independent country.[20] Asians viewed this new law as a signal that they were once again welcome in the United States.[21]

It is important, for the purposes of this case, to recognize that the great majority of Asians enter the

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[18]Immigration and Nationality Act of 1952, 66 Stat. 163, *et seq.*, 8 U.S.C. §§1551 *et seq.*

[19]8 U.S.C. §1151 *et seq.*, Public Law 89-236, amended the 1952 Act, 79 Stat. 911-920, 922.

[20]8 U.S.C. §§1151, *et seq.* Immediate relatives of U.S. citizens are allowed in, distinct from these maximums. INS Report, *supra*, Table 8, indicates that in 1973, 400,063 immigrants were admitted to the United States, about 30% (124,160) of whom were from Asian nations. The Asian immigrants with job qualifications classified as professional, managerial and skilled made up 31% of the total Asian immigration in 1973.

[21]From President Johnson's State of the Union message to Congress, January 8, 1964:

> "We must lift by legislation the bar of discrimination against those who seek entry into our country, particularly those with much needed skills and those joining their families." 110 Cong. Rec. (88th Cong., 2d. Sess., Jan. 8, 1964) p. 115.

United States as permanent resident aliens;[22] they intend to stay.[23] To do so successfully, these immigrants must be able to compete for a full range of meaningful employment options.

The barriers to employment of aliens, erected in the late 1800's,[24] have begun to lower. Now that the States may no longer ban resident aliens from public employment,[25] the federal civil service system remains the only substantial vestige of our former immigration policies.

IMPACT OF THE DENIAL OF FULL OPPORTUNITY IN THE LABOR MARKET

Although an analysis of the Immigration and Naturalization Service statistics indicates that Asian immigrants are both skilled and experienced,[26] permanent resident aliens are an economically deprived

[22]77.4% of all Asians, 85.1% of Chinese and 86% of Philipinos. INS Report, *supra*, Table 34 at 98. The remainder enter the country as students, visitors or for job-training purposes.

[23]"Unlike earlier Chinese immigration, which consisted in large part of single men who came to this country with the intention of returning to China after their fortunes were made, today's Chinese newcomers are most often families seeking a new life for themselves and their children within American society." BASPC Study, *supra*, p. 22.
Asian immigrants travel a great distance, not only in terms of geogra[illegible] but no less so in terms of culture, language and lifestyle. The decision to immigrate would not be made lightly.

[24]*E.g.*, *Truax v. Raich* (1915) 239 U.S. 33 (private employment); *Takahashi v. Fish & Game Comm.* (1948) 334 U.S. 410 (commercial fishing licenses); *Purdy & Fitzpatrick v. State of California* (1969) 71 Cal. 2d 566 (public works projects in California).

[25]*Sugarman v. Dougall*, 413 U.S. 634 (1973).

[26]INS Report, *supra*, at 8.

segment of our society.[27] The federal regulation which has excluded resident aliens from federal civil service employment is a major contributing factor to this condition.

The adverse effects on the San Francisco Asian community are profound. First, of course, many job opportunities are lost. At least 27.8% of all Chinese male immigrants residing in San Francisco, aged 14-64, are unemployed—four times the city's average unemployment rate.[28] Pilipino resident aliens suffer an unemployment rate of 15-17%[29]—twice the city average.

Second, most of the recent non-white immigrants settle in a few highly concentrated areas where only limited job opportunities are available. Anxious to find any source of income, they work long hours for subsistence wages at jobs for which they are overskilled, with little chance of moving from the ghetto or of advancing in the labor market. At least 50%[30] of the Chinese resident alien community and a stag-

[27]Of unrelated Chinese and Pilipino individuals age 14 and above in San Francisco in 1969, 35.8% and 29.6%, respectively, were below the federal poverty level. This compares to a 20.3% figure for whites, "Ethnic Groups, Veterans and the Handicapped in San Francisco," State of California, EDD, No. Calif. Employment Data and Research, June 1974, p. 18 (based on the 1970 census).

[28]BASPC Study, *supra*, p. 40.

[29]Interview with Rod Estrada, then director of Sandigan, in August, 1974. Statistics are based on their comprehensive employment files.

[30]BASPC Study, *supra*.

gering 75%[31] of the Pilipino community are underemployed.[32]

Third, this pattern of unemployment-underemployment becomes so established it cannot be changed once citizen status is achieved. After a minimum of five years[33] of barely managing to survive in the secondary labor force, Asians find it difficult, if not impossible, to change from secondary to primary employment.[34] Their skills may no longer be relevant; time to seek out new and meaningful employment is limited, and diminished self-esteem may turn job failure into a self-fulfilling prophecy. The International Institute of San Francisco reports a typical case:

> "A Pilipino doctor and his wife are working as live-in domestics and will be saving part of their meager earnings for some time to bring over their four children. . . . He is ashamed to admit to his employer that he is a doctor. It is doubtful this doctor will ever be able to stop from his toil long enough to pursue additional education and study to qualify and prepare for professional and

[31]Estimate based on interviews in July and August 1974 with six major Pilipino community groups in San Francisco: Sandigan, Phil-Am Neighborhood Association, POC, PACEO, Pilipino Newcomers' Advisory Committee and the International Institute.

[32]Underemployment is generally defined as working at a less than full-time job, working full-time at less than the prevailing wage for that position, or working at a position not commensurate with one's skills.

[33]The minimum period required to qualify for citizenship status, 8 U.S.C. §1427(a).

[34]Primary jobs are those with prevailing wages for the occupation, fringe benefits, safe working conditions, promotional opportunities and training for advancement. Secondary jobs lack one or all of these conditions and are generally low-level, dead-end positions.

> State exams to enable him to practice medicine in California.[35]

Finally, the secondary effects of low economic status are highly evident. For example, Pilipinos, constituting 3.4% of San Francisco's population, account for 8% of the premature births and 10% of the reported cases of tuberculosis in the City.[36] Pilipino newcomers do not utilize the services of San Francisco General Hospital because, in their culture, usage of a "charity ward" is associated with loss of self-respect. However, many newcomers cannot afford private medical services and therefore do not receive proper medical attention.[37]

THE IMPACT OF OPENING FEDERAL JOBS TO RESIDENT ALIENS

Projections for the labor market indicate that governmental jobs are increasing at nearly twice the rate of jobs in private industry.[38] Because the government is the country's largest and fastest growing employer, and because entry is based on a merit system, opening civil service ranks to resident aliens would have a significant impact on their employment

[35]Pilipino Newcomers' Advisory Committee and International Institute of San Francisco, "Pilipino Immigration to California and the Contemporary Situation in San Francisco," March 1972, p. 11.

[36]San Francisco Department of Public Health, Statistical Report 1970, City and County of San Francisco, p. 12.

[37]Grassman, G., Health Care & the Filipino Community, San Francisco General Hospital, San Francisco, 1971, p. 7.

[38]U.S. Dept. of Labor Report, "New Job Opportunities" (1972).

rates. It would mean jobs for the unemployed and advancement of the underemployed. This, in turn, would result in increased income levels. As of March 31, 1972, the median annual income for domestic federal employees under the General Schedule pay plan was $12,553.[39] This compares with median annual incomes of $4,790 for Chinese and $5,145 for Filipinos in San Francisco.[40]

As of April, 1974, the domestic civilian federal workforce totaled 2,708,131.[41] 296,509 of those jobs were located in California as of December 31, 1973.[42] In the San Francisco/Oakland Standard Metropolitan Statistical Area alone, there were 73,436 federal jobs.[43] The government offers positions in almost every conceivable type of work, utilizing the immensely varied skills of the population. Likewise, the occupational skills of permanent resident aliens range from professional to technical to unskilled.[44] For example, an extraordinarily large percentage of Pilipino immigrants are officially classified as professional, technical

[39]United States Civil Service Commission, Bureau of Manpower Information Systems, Manpower Stats. Div., "Pay Structure of the Federal Civil Service, March 31, 1972." Table 2 at 13. The General Schedule plan covers 68.5% of the federal domestic workforce. The median annual income for all pay plans totals $11,820. *Ibid.*

[40]U.S. Dept. of Commerce, Bureau of Census, *Social and Economic Indicators*, Table 43, San Francisco, 1970.

[41]U.S. Civil Service Commission, Bureau of Manpower Information, Manpower Stats. Div., "Federal Civilian Manpower Statistics," June, 1974.

[42]*Ibid.*

[43]*Ibid.*

[44]INS Report, *supra*, Table 8 at 38. See Statement of the Case in Respondents' Brief in this case, filed December, 1974.

and kindred workers—27.9% in the year ended June 30, 1973.[45] Overall, 10,477 (32.6%) of the Pilipinos entering in the year ended June 30, 1973, would be qualified for positions under the General Schedule pay plan of the Civil Service. Another 3.8% (1,218) possess skills approximating those required for positions under the Wage System.[46]

Civil Service jobs are not generally sensitive positions. In fact, it is extremely ironic that the one exception allowing non-citizens to apply for federal employment is related to highly sensitive jobs.[47] It is also contradictory that aliens have an obligation to serve the government in the armed forces, where pay is lower than in civilian positions, and where there is no less, and quite possibly a greater, national security interest involved than in the Civil Service.[48] The prohibition against resident alien employment in the government service denies, on a totally non-job-related basis, employment opportunity to qualified applicants even in non-sensitive positions.

[45]*Ibid.*

[46]The General Schedule is basically equivalent to the government's white collar workforce, and the Wage System covers those workers in the trades, crafts and services. The figure represents the sum of the following white collar categories: Professional, technical and kindred workers; Managers, officials and proprietors; Clerical and kindred workers; and Sales workers. INS Report, *supra*, Table 8 at 38.

[47]5 C.F.R. §338.101(b)(1)&(2); 5 C.F.R. §213.3101-.3394; *Jalil v. Hampton*, 460 F.2d 923, 931 (D.C. Cir. 1972) (Bazelon dissent).

[48]A final irony is that veterans are normally awarded preference points in Civil Service competition—a preference which veteran aliens cannot use.

CONCLUSION

For the above stated reasons, and for those stated in the Respondents' brief, the decision of the Court of Appeals for the Ninth Circuit should be affirmed.

Dated, San Francisco, California,
December 16, 1974.

Respectfully submitted,

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